



Legal Update

December 2015

The Court held that police had reasonable suspicion to conduct an investigatory stop even though eyewitness descriptions did not match the defendant!

Commonwealth v. Johnson, Mass. Appeals Court, No 14 – P-1400, (2015):

Background: Lynn Police received a number of 911 calls relaying that there were “shots fired” on Harwood Street. One witness described the shooter as “being a black male, wearing a black jacket and a red bandana,” and running toward “Western Avenue.” Within minutes of receiving this information from dispatch Officer James McIntyre who was in the area responded that he had a “party with a gun near 170 Commons Street.”

When Officer McIntyre heard the initial dispatch he drove in the direction of Harwood Street with his siren and lights activated. He deactivated his lights and siren as he approached the Lynn Commons. The Commons is “a long narrow park area that extends ten blocks, and has numerous trees at the end of the park.” Officer McIntyre observed two females and a male identified as Gabriel Smith inside the Commons. Smith was ordered to place his hands on top of his head and he responded by screaming. At a later point, Smith was arrested for disorderly conduct.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department’s legal advisor or prosecutor.

During his encounter with Smith, Officer McIntyre saw “the silhouette of a person walking away from him near the tree area of the Commons, within twenty-five feet of where he was standing.” Officer McIntyre used his flashlight to observe the individual who was a “black male, with a gray hoodie pulled tightly around his face.” The man had his hands around his sides and Officer McIntyre ordered him to place his hands on top of his head twice before the man complied. Officer McIntyre approached the man, who was identified as Cajou Johnson (hereinafter referred to “Johnson”), conducted a patfrisk and “felt an object he believed to be a handgun in Johnson’s left front pocket.” Officer McIntyre controlled Johnson by use of “arm bar.” Johnson was not wearing a black jacket and he did not have a red bandana as was initially reported. Officer McIntyre retrieved a gun from Johnson and contacted dispatch. The entire encounter with Johnson occurred three and half minutes after the first dispatch.

Johnson was charged and filed a motion to suppress arguing that Officer McIntyre lacked reasonable suspicion to stop him. During the motion, there was no dispute as to the timing of when Johnson was stopped or whether the patfrisk was reasonable. Additionally, the motion judge never considered the fact that Johnson was in found in a closed park and therefore was committing a criminal trespass. Rather the motion judge focused on the proximity to the shots being fired in a residential incident and the time span of when Johnson was found.

The last issue the judge addressed focused on the clothing Johnson was wearing along with his physical description. According the motion judge, although “Johnson was not wearing a black jacket and a red bandana it does not negate or prevent articulable suspicion from being present. Outer clothing such as a jacket and bandana are easily discarded and probably not uncommon when a person is fleeing a shots fired incident.” The motion was denied and Johnson was convicted of carrying a firearm without a license as a second offense and carrying a loaded firearm. Johnson appealed his conviction and the Court had to consider whether the motion judge erred when found that Officer McIntyre had reasonable suspicion to believe Johnson was involved in the shootings when he stopped him.

Conclusion: The Court affirmed Johnson’s convictions and upheld the denial of Johnson’s motion to suppress.

1st Issue: Did Officer McIntyre have reasonable suspicion to stop Johnson?

The Court concluded that Officer McIntyre had reasonable suspicion to warrant an investigatory stop of Johnson based on a number of factors. Some of the factors the Court considered were the span of time that had elapsed from the initial dispatch to when Officer McIntyre located Johnson. The facts indicated that Officer McIntyre observed Johnson less than three and half minutes after receiving multiple reports of shots fired on Harwood Street.

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Additionally, the Court determined that Johnson's actions of trying to stay hidden among trees in a closed public park after dark and wearing a hoodie tightly drawn around his face suggest he was trying to stay hidden from police.

Another factor the Court considered involved the proximity of where Officer McIntyre encountered Johnson. A report indicated that the shooter fled toward Western Avenue. When Officer McIntyre found Johnson, he was in a location opposite the direction of Western Avenue.

The reliability of the 911 callers was not challenged but rather the "particularity of the callers' descriptions." The rule is the physical description need not be so limiting that it can only match one person, but it cannot be so general that it would encompass a large number of people who are in the area. The description of one caller identified the shooter as black while another indicated the shooter was Spanish. Both 911 callers failed to provide a particularized description that would establish reasonable suspicion. One caller stated that one of the shooters was wearing a black jacket and a red bandana. Johnson was not wearing a black jacket and he did not have a red bandana. Even Officer McIntyre testified during the motion that "nothing connected Johnson to the shooting other than being a black or Hispanic male."

Despite the lack of a particularized description, in the aftermath of a shooting, even if there is no particularized description of a suspect, the police may stop someone when circumstances make the seizure reasonable under the 4th Amendment or Article 14. See *Commonwealth v. Depina*, 456 Mass at 247; (where gravity of the crime and the present danger of the circumstances may be considered reasonable suspicion.). In the underlying case, "physical proximity, closeness in time, Johnson's efforts to conceal and the danger to public safety supplemented the less distinctive physical description relayed in the police dispatch," and established reasonable suspicion when looked at together. The Court affirmed the denial of Johnson's motion to suppress and concluded that "taking these elements together, at the time of the Terry stop (See *Terry v. Ohio*, 392 U.S. 1 (1968)), Officer McIntyre had a reasonable suspicion that Johnson had been involved in the shooting."

Commentary: This year the SJC ruled in *Jones-Pannell* that the police lacked reasonable suspicion to seize the defendant because there were no facts in the record to establish that *Jones-Pannell* was involved in a crime or about to commit a crime. It will be interesting to see how the SJC will rule if Johnson appeals the Court's decision. Unlike *Jones-Pannell* the police in the underlying case, were responding to a dispatch involving shots fired in a residential area. Although Johnson did not match the particularized description that eyewitness callers had provided, the Court found that there were other factors that justified stopping Johnson.

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